No. 14538

United States Court of Appeals
For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of Indians, etc., *Appellant*,

vs.

JOSEPH JOE, *et al.*, as members of the Senate of Swinomish Indian Tribal Community, a federal corporation, *Appellees*.

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DISCHARGING ORDER TO SHOW CAUSE

HONORABLE JOHN C. BOWEN, *Judge*

ANSWER BRIEF ON BEHALF OF APPELLEES

HARWOOD BANNISTER
and
WARREN J. GILBERT
Attorneys for Appellees

Office and Post Office Address:
204 Pioneer Building,
Mount Vernon, Washington

THE ARGUS PRESS, SEATTLE

No. 14538

United States Court of Appeals
For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of Indians, etc., *Appellant*,

vs.

JOSEPH JOE, *et al.*, as members of the Senate of Swinomish Indian Tribal Community, a federal corporation, *Appellees.*

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DISCHARGING ORDER TO SHOW CAUSE

HONORABLE JOHN C. BOWEN, *Judge*

ANSWER BRIEF ON BEHALF OF APPELLEES

HARWOOD BANNISTER
and
WARREN J. GILBERT
Attorneys for Appellees

Office and Post Office Address:
204 Pioneer Building,
Mount Vernon, Washington

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

TEXTBOOKS

TREATIES

COURT RULES

United States Court of Appeals
For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of Indians, etc., *Appellant*, vs. JOSEPH JOE, *et al.*, as members of the Senate of Swinomish Indian Tribal Community, a federal corporation, *Appellees.*	No. 14538

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DISCHARGING ORDER TO SHOW CAUSE

HONORABLE JOHN C. BOWEN, *Judge*

ANSWER BRIEF ON BEHALF OF APPELLEES

STATEMENT RELATIVE TO JURISDICTION

Appellees contended in the District Court and contend here that this action is not one within the jurisdiction of a Federal Court.

Appellant in his jurisdictional statement fails to set forth the pleadings and facts disclosing the basis upon which it is contended the District Court had jurisdiction and the Circuit Court has jurisdiction. The Appellant makes no reference to any treaty of the United States, or statute, the validity of which is in question or to any pleading necessary to show the existence of jurisdiction. Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18, 2(b).

Whether an action is within the jurisdiction of a Fed-

eral Court is open to question at any time. Federal Rules of Civil Procedure, Rule 12(h); *Neirbo Company, et al., v. Bethlehem Shipbuilding Corporation, Ltd.* (1939) 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167; *Miller v. First Service Corp.* (CCA 8th 1936) 84 F.(2d) 680.

The principal contention of appellant, as it appears from his brief and Amended Complaint, is that he is entitled at this time to a mandatory injunction based upon a purported judgment of the Swinomish Indian Court and ultimately to the relief provided by said purported judgment. Whether such judgment is entitled to full faith and credit does not involve the interpretation of any United States Constitutional provision nor any law or treaty of the United States. *Gold-Washing and Water Co. v. Keyes* (1878) 96 U.S. 199, 29 L.Ed., 656.

As disclosed by his Amended Complaint (R. 1) Plaintiff claims ownership of the assets upon the Swinomish Indian Reservation. Title to the real property is vested in the United States Government for the benefit of all Indians who were parties to the Treaty of Point Elliott (12 Stat. 928); *United States v. Stotts* (1930) 49 F.(2d) 619; Defendants' Exhibit A-1 (Tr. Vol. 2, 22). Appellant's dispute is with the United States Government and not with these appellees.

Whether a receiver should be appointed does not involve a Federal Question.

No rights of a Federal nature are at issue herein. *Security First National Bank of Los Angeles v. Republic Pictures Corp.* (D.C. Calif. 1951) 97 F. Supp. 360.

The action of appellant should be dismissed.

STATEMENT OF CASE BY APPELLEES

Appellees controvert the preliminary statement and the statement of the case made by appellant. The evidence establishes the following as the facts.

By the Treaty of Point Elliott, 12 Stat. 928, various tribes of Indians ceded to the United States the lands therefore occupied by them. By Article Two of the Treaty there was reserved to the Indians four reservations, one of which was designated as "the peninsula at the Southeastern end of Perry's Island called Shais-Quihl." The four tracts so set apart were reserved for the exclusive use and occupancy of all of the Indians who were parties to the Treaty of Point Elliott. No particular tract was reserved for any particular tribe. The Swinomish Tribe was a party to said Treaty and ceded all its land to the United States. Treaty of Point Elliott 12 Stat. 928. See Defendants' Exhibit A-1 (Tr. Vol. 2-22).

By Article Four of the Treaty of Point Elliott the "said tribes and bands agree to remove to and settle upon the first above mentioned reservations (as set out in Article Two) within one year after the ratification of this Treaty, or sooner, if the means are furnished to them." There moved upon the reservation designated as the Southeastern end of Perry's Island Indians of the then existing tribes of Swinomish, Samish, Skagit, Kikiallus and others. This area became known as the Swinomish Reservation.

The actual area of the Swinomish reservation was delimited by executive order dated September 9, 1873. See Indian Affairs, Laws and Treaties, Vol. 1, Page 925, U.S.

Government Printing Office 1903. The head note indicates that the Swinomish Reservation is in the Tulalip Agency and occupied at that time by Dwamish, Etakmur, Lummi, Snohomish, Sukwamish and Swinomish.

Substantially all the land on the reservation has been allotted, a considerable part to Indians of various tribes other than the Swinomish Tribe. See Affidavit of Tandy Wilbur, Sr. (R. 184, 193-196); Plaintiff's Exhibit 16 (Tr. Vol. 2-152). Of seventy allottees the Swinomish Indians numbered twenty-three or approximately one-third, the balance of the allottees were from the aboriginal tribes of Skagit, Samish, Kikiallus, Snohomish, Snoqualmie and Twa-za-hub.

About 1928 the Indians residing on the Swinomish reservation organized what was known as the Swinomish Tribal Council, such organization being affected by practically all of the Indians residing on the Reservation (testimony of Wilfred Steve, reporter's transcript of testimony, Vol. 2, Page 10). The first members of the council were from the following tribes of Indians; Kikiallus, Lower Skagit, Swinomish, and Samish, being elected by the Indians residing upon the Swinomish reservation (see reporter's transcript of testimony of Plaintiff, Vol. 1, Pages 116-118).

In 1936 the Indians, who as a matter of right, were residing on the Swinomish reservation organized the corporation known as the Swinomish Indian Tribal Community, a federal corporation (Constitution and By-Laws, Tr. Vol. 1-2-50; Corporate Charter Tr. Vol. 1, 68). This organization is in fact the defendant in this action. Power to hold, manage and control the assets of

the Swinomish reservation is vested in the Tribal Community (Constitution and By-Laws and Corporate Charter Plaintiffs' Exhibits 14 and 15 (Tr. Vol. 1, 2-50; Vol 1, 68).

From the time of the formation of the corporation to 1949 all corporate funds were handled by the Western Washington Indian Agency at Tulalip, Washington. During the period the Plaintiff was chairman of the Senate (1938-1940) gross revenue from the operation of the fish traps was as follows: 1938—$11,102.58; 1939—$1,299.38; 1940—$9,709.80. See Supplemental Affidavit of Tandy Wilbur, Sr. (R. 169 at 184-185). Through proper management the Swinomish Indian Tribal Community continued to grow so that at the end of 1952 its consolidated balance sheet showed capital and surplus of $272,890.04 and gross revenue from business and other activities of the Tribal Community during the year 1952 in the amount of $203,206.79. See Plaintiff's Exhibit 6 (Tr. Vol. 1, 2-50) Compare Plaintiff's Exhibit No. 5 (Tr. Vol. 1, 2-50).

The business and affairs of the corporation are managed by a board of eleven Senators elected and qualified in accordance with the provisions of the Constitution and By-laws.

A law and order code was adopted for the Indians residing on the Swinomish Reservation and a court of inferior and very limited jurisdiction was established. Plaintiff's Exhibit 3 Tr. Vol. 1, 68). A purported judgment of the Swinomish Indian Court was entered July 8, 1953, enjoining the Swinomish Indian Tribal Community from carrying on or transacting business or af-

fairs for the Swinomish Tribe. Plaintiff's Exhibit 4 (Tr. Vol. 1, 68). The validity of such judgment is denied by the Appellees as the Swinomish Indian Court has no jurisdiction over the subject matter or the party in interest in the action on which the purported judgment was founded. See Amended Affidavit of Tandy Wilbur, Sr. (R. 144, page 146). The Judge of the Swinomish Indian Court is a party in interest to the action being a member of the Swinomish Tribe. See Affidavit of George McLeod dated June 10, 1954 (not indexed but No. 14 on Appellant's designation of record of appeal (R. 40 (19)). In any event the Appellees have been carrying on the business affairs and handling the property of the Swinomish Indian Tribal Community, a federal corporation, and have not been carrying on or transacting any business or affairs for the Swinomish Tribe.

Plaintiff, about May 13, 1954, filed his Complaint in the United States District Court for the Western District of Washington praying that the present Senate of the Swinomish Indian Tribal Community be removed and a new election ordered and that there be an accounting. At the time of filing his Complaint the Plaintiff secured the issuance of an Order to Show Cause (R. 21), requiring the Appellees to show why they should not, pending a trial on the merits, turn over the temporary management of the enterprises on the Swinomish Reservation to the council of the Swinomish Tribe of Indians or that a Receiver be appointed, such request being based on alleged malfeasance and misfeasance and mismanagement. See Appellant's Brief, Page 47, lines 10-13.

Appellant, thereafter, filed his amended Complaint (R. 1) praying that the Appellees comply with the purported judgment of the Swinomish Indian Court and that an Order be entered enjoining the Appellees from exercising any control over the property on the Swinomish Reservation and that there be an accounting.

Appellees moved to strike, make more definite and certain and to elect (R. 25) and to dismiss, (R. 23) which motions were heard subsequent to the hearings on the Motion to Show Cause and were denied (R. 40) (7).

Two hearings on the Order to Show Cause were had at Seattle and the cause was then transferred to Bellingham upon motion of the Appellees where further hearings were held.

The evidence contained in the record on appeal was introduced at the hearings held upon the Order to Show Cause and was all directed at the need for an appointment of Receiver on the grounds of alleged malfeasance, misfeasance and mismanagement of the present Senate. After considering all of the evidence and hearing the argument of counsel, the Court orally ruled that the Order to Show Cause be discharged without prejudice to the authority of the Court to determine the action on the merits at a later time (Journal entry R. 131 (a)(b).

Appellant filed a motion for reconsideration of the Court's oral decision (R. 28).

On July 27, 1954, the Court requested counsel to prepare Findings of Fact and Conclusions of Law in accordance with the Court's previously announced oral

decision. Reporter's Transcript of Testimony, Vol. 2, pages 33-34.

On July 30, 1954, the Court, after argument, orally denied Appellant's motion for reconsideration of oral decision and entered the Findings of Fact and Conclusions of Law and Order Discharging Order to Show Cause (R. 40 (1), (3)). An order *nunc pro tune* was entered denying appellant's motion for reconsideration (R. 40) (7).

Appellant gave notice of appeal to the Circuit Court (R. 40 (16)).

SUMMARY OF ARGUMENT

The argument of the Appellees, aside from answering various contentions raised by the Appellant in his argument, is based upon the following points:

1. The only issue before the District Court was whether or not a Receiver should be appointed and the finding of the trial court on that is supported by the evidence.

2. The merits of a controversy are not to be litigated upon an Order to Show Cause.

3. An action on a foreign judgment is a new and independent action to be tried as any civil action.

ARGUMENT

Appellees appeared in Court pursuant to an order directing them to show cause why they should not turn over the temporary management of the enterprises on the Swinomish Indian Reservation to the Council of the Swinomish Tribe of Indians until a new election could be held of the Swinomish Indian Tribal Community Senate or in the alternative that a receiver be appointed to take possession of the enterprise and conserve the same pending a trial on the merits of Plaintiff's Complaint (R. 21-22).

The appointment of a Receiver is a harsh remedy and relief will be granted only in a clear case. *United States v. Honolulu Consolidated Oil Company* (1918) 249 Fed. 167. See also *Strickland v. Peters* (1941) 120 F.(2d) 53.

A receiver will be appointed only on a plain showing of some loss or injury to the property which the receivership could avoid. *Garden Homes, Inc. v. U.S.* (1952) 200 F.(2d) 299.

Appellant, in his brief, spends little time on this phase of the case. See Appellant's brief, pages 28-36. While Appellees do not believe that a recitation of the evidence is necessary some reference thereto is necessary.

Appellant relies mainly upon the testimony of Mr. R. H. Kendall. The suggestion in Appellant's brief contained on Page 28 thereof, that Mr. R. H. Kendall lost his job because he testified on behalf of the Plaintiff is without basis. See Supplemental Affidavit of Tandy Wilbur, Sr. (R. 169 at Page 190). A considerable portion of the testimony of Mr. Kendall dealt with matters

with which the present Senate was not concerned. Page 33 of Appellant's brief contains a heading "Shortages in Funds." The shortages, if any, exist in the Western Washington Indian Agency office and not in the Swinomish Indian Tribal Community accounts handled by the present Senate. As Mr. Kendall stated it was for the Western Washington Agency to clarify (See Plaintiff's Exhibit No. 11, Tr. Vol. 1, 2-50).

At the time of preparing the financial statements introduced in evidence herein as Plaintiff's Exhibits Nos. 5 and 6 the witness R. H. Kendall had the following to say:

"PURPOSES AND ACTIVITIES

"The obvious primary purpose in the formation of the corporation was to provide a permanent legal entity as the means of community welfare and betterment, free of the necessity for continual assistance grants. This purpose has been well served, despite many handicaps." (Plaintiff's Exhibit No. 6, page 9; Tr. Vol. 1, 2-50).

and also:

"Despite the starting handicaps of lack of capital, and lack of executives trained in commercial financing and managing, the corporation has steadily built itself up to its present scope of operations. The fishing industry, and oyster bed and sawmill are now operated by the corporation. In addition to providing commercial employment for its members (1948 payroll $53,468.88) it provided its members with inexpensive housing, considerable supplies of food, and extensive recreation and community activity including community policing and government and from its own funds, considerable assistance to its members for commercial purposes,

education, and emergency financing." (See Plaintiff's Exhibit No. 5, page 2; Tr. Vol. 1, 2-50).

Appellant's evidence of mismanagement was all controverted by the Appellees, a considerable portion of the evidence on behalf of the Appellees coming from distinterested witnesses.

The District Court after having very carefully considered and re-considered the evidence entered Findings of Fact and Conclusions of Law (R. 40 (3)). Number Five of said Findings reads as follows:

> "There has been no showing made at this time that there has been or is threatened any loss or injury to the property which is the subject matter of this action which would be avoided by the appointment of a Receiver herein pending a trial of this matter on the merits." (Tr. Vol. 2, Pages 36-37, 53).

Such finding is not to be set aside unless clearly erroneous. Federal Rules of Civil Procedure, Rule 52.

There being no showing that a receivership could avoid any loss or injury to the property the Court correctly ordered the discharge of the Order to Show Cause. *Garden Homes, Inc. v. U. S.* (1952) 200 F.(2d) 299.

The object of the action by the Plaintiff is to secure for himself and the Swinomish Indian Tribe all of the assets on the Swinomish Indian Reservation. See Reporter's Transcript of oral testimony of Plaintiff, Vol. 1, Page 150, lines 3-6. Appellant claims ownership based upon aboriginal title. See Appellant's brief, Page 45-47. He also claims it by reason of the purported judgment

of the Swinomish Tribal Court (see Amended Complaint (R. 1)).

Ownership of the real property including tidelands is vested in the United States for the benefit of all of the Indians residing upon the Swinomish Indian Reservation. Treaty of Point Elliott (12 Stat. 928). *United States v. Stotts* (1930) 49 F.(2d) 619. The Appellant recognizes that the Swinomish Tribe of Indians does not have ownership of the land or tideland of the Swinomish Reservation. The Appellant, purporting to be Chief of the Swinomish Tribe of Indians, verified a Petition filed before the Indian Claims Commission in which damages are asked from the United States Government for the taking of the property held aboriginally by the Swinomish Tribe of Indians. Defendants' Exhibit 1 (Tr. Vol. 2, 22).

Appellant suggests there can be no transfer of said property rights by implication. The Appellees were specifically given the right to manage and control the assets upon the Swinomish Reservation. See Plaintiff's Exhibits Nos. 14 and 15 (Tr. Vol. 1, 2-50, Tr. Vol. 1, 68).

Article Four, Section 1, subsections c and f, vests in the Senate of the Swinomish Indian Tribal Community the power to manage and control the Tribal lands and Tribal assets and to manage all economic affairs and enterprises of the Swinomish Reservation (Plaintiff's Exhibit 14, Tr. Vol. 1, 2-50).

It is also provided in Article 8, Section 2, of the Constitution and By-laws (Plaintiff's Exhibit No. 14), that the unallotted lands and lands thereafter acquired should be Tribal Lands held for the benefit of the Com-

munity and section 3 of the said Paragraph 8 provides that the Senate shall have the power to lease the community lands.

Section 7 of the corporate charter (Plaintiff's Exhibit No. 15; Tr. Vol. 1, 68) provides that the community ownership of unallotted lands is expressly recognized.

These provisions, both in the charter and in the Constitution and By-Laws, establish the right of the Swinomish Indian Tribal Community, as a federal corporation, to hold the beneficial interest in all of the assets, including the interest in land and tidelands, for community purposes. The Plaintiff himself was chairman of the Election Board at the time the Constitution and By-laws were adopted and certified to the Adoption. Plaintiff's Exhibit No. 14, Tr. Vol. 1-2-50, Page 11 "Certificate of Adoption."

The foregoing support Findings of Fact 1 and II entered by the District Court (R. 40 (15)).

Plaintiff is attempting to litigate the merits of the controversy upon his hearing to show cause. Motions or orders to show cause cannot be available to settle important questions of law or to dispose of the merits of the case. 37 Am. Jur. Page 503, Motions, Rules and Orders, Section 3; *Illinois C. R. Company v. Adams* (1901) 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410.

The court entered Finding of Fact No. III reading as follows:

> "The ownership of and the right to the beneficial interest in the various property and assets on the Swinomish Reservation is claimed by the Plaintiff

> in a representative capacity and is claimed by the Swinomish Indian Tribal Community, a federal corporation, and it likely will require many days to try such conflicting issues in Court." (R. 40 (15)).

As the ultimate object of the action is to determine ownership of the assets, it is obviously a matter to be tried upon the merits. Such matter as a receivership and preliminary injunction cannot *per se* be the subject of a suit in equity. *DeReese v. Costogula* (CCA N.Y. 1921) 275 Fed. 172.

Appellant bases his claim for injunctive relief upon the purported Judgment of the Swinomish Tribal Court. There was no issue raised by the Order to show cause concerning the purported judgment of the Swinomish Indian Court. The Appellees at all times objected to the introduction of the purported judgment as immaterial to the issues presented upon the hearing. (Reporter's Transcript of testimony, Vol. 1, 72-75).

The appellant assumes that the District Court in requesting Findings pursuant to the provisions of Rule 52 had in mind injunctive relief enforcing the purported judgment of the Swinomish Indian Court. See Appellant's brief, page 27, page 50.

Such assumption is entirely unwarranted.

The words "interlocutory injunction" found in Rule 52 are of very general meaning and it is more logical to assume the Court meant that the appointment of a receiver was in the nature of an interlocutory injunction.

Assuming the validity of the judgment entered by the Swinomish Indian Court it can stand no higher than a foreign judgment. *Cornelious v. Shannon* (1894)

63 Fed. 305. As such it constitutes only a claim or some evidence of ownership or right to possession. The District Court by its Finding of Fact III (R. 40 (15)) found that ownership of and the right to the beneficial interest in the subject matter of this action is in dispute and a matter to be tried upon the merits. The Court did, therefore, make a finding of an ultimate fact with respect to the Swinomish Indian Court judgment.

Plaintiff's position, as evidenced by his argument, is that he is seeking to execute the judgment of the Swinomish Indian Court by a mandatory injunction out of the United States District Court.

Whether the purported judgment of the Swinomish Tribal Court is entitled to full faith and credit is open to question. See *Baldwin v. Iowa State Traveling Men's Association* (1931) 283 U. S. 522, 51 S.Ct. 517, 75 L.Ed. 1244.

The judgment of the Swinomish Indian Court if it be a foreign judgment, gives to the Appellant only a new and independent cause of action to be tried in the District Court as any civil action. *Indemnity Ins. Co. of N. A. v. Smoot* (1945) 152 F.(2d) 667; Cert. denied 328 U. S. 835, 66 S.Ct. 981, 90 L. Ed. 1611. Being a new cause of action it is subject to the same rules as any cause of action. For procedure see *Springs et al. v. James* (1909) 172 Fed. 626.

Whether the judgment of the Swinomish Indian Court is entitled to full faith and credit is open to judicial inquiry. The Appellees have denied that the Swinomish Indian Court had jurisdiction of either subject matter or persons of the Appellees. *Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed.

966. See also 31 Am. Jur. page 138 *et seq.,* Judgments, Sections 530 *et seq.*

Appellants' references to collateral attacks on judgment are not in point.

Appellant makes eleven points on appeal. Insofar as these assign as error the entering of Findings of Fact by the District Court the evidence preponderates in favor of such findings and the Appellant has failed to sustain the burden imposed upon him by Rule 52, Federal Rules of Civil Procedure to show that such Findings are clearly erroneous.

The conclusions of law following from the Findings of Fact and Appellant has not and cannot show where the Conclusions of Law are in error.

The remaining points assign as error the failure of the District Court to enter the proposed Findings and Conclusions of Appellant, and the Failure to give full faith and credit to the Swinomish Indian Court. The lower Court considered the Findings of Fact and Conclusions of Law submitted by the Appellant and declined to enter the same (R. 40 (15)). Many of the Findings proposed by the Appellant were on matters which are to be determined on the merits of this case and not upon the hearing on Order to Show Cause.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

HARWOOD BANNISTER
and
WARREN J. GILBERT
Attorneys for Appellees

Mount Vernon, Washington
204 Pioneer Building,